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In The

Supreme Court of the United States

October Term, 1968

No. 1248

HESMER FOODS, INC.,

Petitioner

— vs. —

NATIONAL LABOR RELATIONS BOARD,

Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX

Opinion Below 2

Decree 3

Decision and Order 5
(including Trial Examiner's Decision)

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Friday, November 17, 1967

Before

Hon. ELMER J. SCHNACKENBERG, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge

NATIONAL LABOR RELATIONS BOARD,	Petitioner,	On Petition for Enforcement of an
No. 16306	vs.	Order of the National
HESMER FOODS, INC.,	Respondent.	Labor Relations Board

This court having considered the record in this case transmitted by the National Labor Relations Board, as well as the briefs filed by the respective parties herein, and having heard oral arguments in open court by counsel for said parties, and having taken the case under advisement for decision, the court has conferred thereon and is now of the opinion and accordingly holds and adjudges that the order of the National Labor Relations Board issued on October 26, 1966 against Hesmer Foods, Inc., respondent, be enforced in full and that a decree accordingly be entered herein.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	No. 16306
HESMER FOODS, INC., Respondent.	)	

DECREE

Before: Schackenberg, Castle and Fairchild, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent on October 26, 1966. The Court heard argument of respective counsel on November 8, 1967, and has considere dthe briefs and transcrips of record filed in this cause. On November 17, 1967, the Court being fully advised in the premises, handed down its decision granting enforcement of the Boaord's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Hesmer Foods, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

/s/ ELMER J. SCHNACKENBERG
Judge, United States Court of
Appeals for the Seventh Circuit

/s/ LATHAM CASTLE
Judge, United States Court of
Appeals for the Seventh Circuit

/s/ THOMAS E. FAIRCHILD
Judge, United States Court of
Appeals for the Seventh Circuit

A True Copy:
Teste:

KENNETH J. CARRICK
Clerk of the United States Court of
Appeals for the Seventh Circuit

161 NLRB No. 45 D-9288
Evansville, Ind.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HESMER FOODS, INC.

and Case No. 25-CA-2354

HOTEL & RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

On May 6, 1966, Trial Examiner Frederick U. Reel issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief and the General Counsel filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and the briefs, and the

entire record in this case, and herby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Hesmer Foods, Inc., its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C. Oct. 26, 1966.

Frank W. McCulloch	Chairman
John H. Fanning,	Member
Gerald A. Brown,	Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

161 NLRB No. 45

TXD-269-66
Evansville, Ind.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

HESMER FOODS, INC.
and
HOTEL & RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO

Case No. 25-CA-2354

MILFORD R. LIMESAND, ESQ., and CLIFFORD L. HARDY, ESQ., for the General Counsel.

JOSEPH A. YOCUM, ESQ., and ARTHUR R. DONOVAN, ESQ., (KAHN, DEES, DONOVAN & KAHN), of Evansville, Ind., for the Respondent.

Before: FREDERICK U. REEL, Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

This case, heard in Evansville, Indiana, on March 10, 1966, 1/ pursuant to a charge filed the preceding Oc-

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1/ All other dates herein refer to the year 1965 ..... unless otherwise indicated.

tober 21 and complaint issued December 22, presents the question whether Respondent discharged five employees on October 13 and 14 for having engaged in union activity, including attendance at a union meeting on October 12, or for the reasons advanced by the Respondent at the hearing. Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel and by Respondent, I make the following:

Findings of Fact

I. The business of the Respondent and the labor organization involved

The pleadings establish, and I find, that Respondent, an Indiana corporation herein called the Company, is engaged at Evansville in the manufacture, processing, packing, and wholesaling of food products, that its operations in interstate commerce place it within the Board's jurisdiction, and that the Charging Party, herein called the Union, is a labor organization within the meaning of the Act.

II. The alleged unfair labor practices

A. Background—the employees at the Company's Stockwell Road plant engage in union activity

The Company maintains two plants in Evansville, one at Stringtown Road and one at Stockwell Road, 5 miles away. The events in this case concern primarily the latter plant. The Company had approximately 22 employees at this plant, of whom 3 or 4 worked on the "night shift" or "clean-up crew," and the balance were on the "first shift." The first shift worked from 7 a.m.

to 4 p.m.; the other men worked from 12:30 p.m. to 9 p.m. Of the five men whose discharges are at issue here, Bunker and Cowan worked on the "clean-up crew; Bruning, Galloway, and Sumrall worked on the other shift. These five men, and two others not involved in this proceeding, signed union cards early in October, and the seven men attended a union meeting on the night of October 12 at the home of a union representative. Bunker, who had distributed the union cards, testified that he had done so on company premises, and that while on company property he had talked to employees about union matters and about union meetings. Cowan, who received his union card from Bunker while at work, also talked to some day-shift employees about signing cards. Galloway, who received his union card from Bunker in the plant, had himself given union cards to two employees, and kept such cards in his locker. Sumrall gave out one union card and spoke to one other employee about signing a card. Bruning, prior to his discharge, had given a card to one man. Company President Mitchell testified, however, that he was unaware of the union activity until October 13, when he learned of it under circumstances described below.

B. Company President Mitchell's conversation with employee Cowan on October 11

On Monday, October 11, Company President Mitchell took a future employee, London Davis, through the Stockwell Road plant. Davis was the first Negro ever to be hired for work at that plant. That evening Mitchell had a conversation with employee Charles Cowan at the plant, in the course of which Cowan expressed his opposition to the hiring of Negroes and added that

other employees, specifically naming Bunker, were likewise opposed. Indeed Cowan told Mitchell (mistakenly, according to both Cowan's and Bunker's testimony) that Bunker had threatened to post an anti-Negro sign on the door of the men's restroom. Mitchell expressed surprise and disapproval at this expression of prejudice, particularly because (according to his testimony) he had previously asked his supervisors, Johann and Ten Barge, to inquire into the employees' attitude, and they had reported there was no prejudice.

C. **Mitchell meets with his supervisors on October 12**

According to Mitchell, he met with Johann and Ten Barge the next morning. (Johann and Ten Barge did not testify.) Mitchell told them of his conversation with Cowan the night before. His testimony continues:

A. I asked who besides this Bunker would be the ones that woul dbe prejudiced towards Negroes working in there. That's when Johann said he felt sure he know who they were. They were a little clique that ran together, he'd been warning their work was no good, and he'd just as soon not have them if they were going to cause that kind of trouble. He warned them several times. He pointed out who they were. I said, "Well, let them work to the end of the work week and let them go. We can't afford to have this kind of trouble."

Q. Who did they mention?

A. They mentioned Sumrall and Bruning and Galloway and I asked them about Bunker and they said he hadn't been there but a week or two. And

> I said, "Well, just let those fellows go when their work week is up," which was the next day. "We don't want them around any more."

Later Mitchell made it clear that Johann had referred only to Bruning, Sumrall, and Galloway as a "clique that fraternized together" who "had caused him a lot of trouble on the day shift." According to Mitchell, he decided at this meeting "to discharge those three and Cowan because he had definitely said that he was against Negroes. These three because their work was unsatisfactory, and we felt they were part of the group that would cause the trouble."

D. The discharges

1. Galloway, Bruner, and Sumrall

The next day, Wednesday, October 13, was the last day of the workweek, which at the Company runs from Thursday through Wednesday. When Bruning, Galloway, and Sumrall went to punch out that afternoon, they found their timecards missing. Johann called them to his desk and said they were discharged. He told the three that because their work had not improved they were being let go (according to Sumrall) or that their work was unsatisfactory (according to Bruning). There is no evidence that any of them had ever been criticized for poor work; indeed, Sumrall testified to the contrary, and Galloway had received a pay raise the week before. 2/ The three men were friends, rode to work together, and visited together

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2/ They apparently had been warned for tardiness, but the Company does not contend that this was a cause of their discharge.

during breaks; they did not, however, associate to any appreciable extent with Cowan and Bunker.

2. Bunker

Upon being notified of the discharges, Galloway went into the plant to tell Bunker, who promptly came to the office and obtained Johann's permission to make a telephone call. Johann gave permission but, while Bunker was dialing, asked to whom the call was directed. Bunker replied, "The Union," to which Johann returned, "What Union?" adding that there was no union there. Bunker said there soon would be, and asked if Johann was going to fire him for union activity too. An argument ensued between Johann and Bunker, during the course of which both men became angry and Johann left the room. Bunker then returned to his work. None of the witnesses at the hearing who also witnessed the exchange between Bunker and Johann testified to any statement or action of Bunker vis-a-vis Johann other than those recited above; Bruning testified that Bunker did not assume a menacing attitude or threatening stance toward Johann, and the other witnesses were not asked about the matter. Johann, although present in the hearing room, was not called as a witness.

Mitchell was in his office with Sales Manager Gorman that afternoon shortly after 4 when Johann entered and told Mitchell that the men had been discharged and that Bunker had threatened him, had used abusive language and gestures, and had accused him of discharging the men for union activity. Mitchell promptly went to Bunker and discharged him. According to Mitchell and Gorman, who was also present, when Bunker asked the reason, Mitchell told Bun-

ker he was fired for being insubordinate to Johann. Bunker and Cowan, who was likewise present, testified that insubordination was not mentioned, and that when Bunker asked if he was fired for union activity, Mitchell called Bunker an "agitator," a term Mitchell did not remember using and was "reasonably sure" he had not used. I find that Mitchell used both expressions. I credit his and Gorman's testimony that he referred to "insubordination," but the testimony of Bunker that he called Cowan's attention to Mitchell's use of the word "agitator," and Cowan's confirmation of this fact although he is again in the Company's employ, lead me to find that this term was also employed. Mitchell also at this time charged Bunker with race prejudice, which Bunker denied, explicitly also denying that he had threatened to put a notice on the restroom door.

3. Cowan

Cowan was in or near the office when Johann discharged the three men. Shortly thereafter, Cowan inquired of Johann as to the reason for the discharges, to which Johann replied that it was none of Cowan's business, and that Cowan should "shut his mouth and get back to work," which Cowan did.

As stated above, Cowan was also present during the conversation between Mitchell and Bunker. According to both Bunker and Cowan, the latter's only participation in the matter occurred when Bunker asked if Cowan had heard Mitchell call Bunker an "agitator," at which point Cowan answered "Yes" and Mitchell asked Cowan: "What have you got in this?" To quote Cowan's rather obscure testimony: "And I said—right

there I didn't say nothing, but him and Jim Bunker was talking, and I said, 'Yes, I have.'"

Mitchell testified that when he fired Bunker, Cowan "said something apparently to Bunker. I though he was talking to me . . . I said 'What did you say?' He said, 'I didn't say anything to you.' And I said, 'Well, you won't be able to say too much to me after this, anyway.'" Mitchell further testified that in his conversation with Cowan on October 11 he had mentioned that Cowan might become an instructor of the new employees on new machines similar to that Cowan was operating. The testimony continues:

TRIAL EXAMINER: When did you make up your mind to fire Cowan?

THE WITNESS: Well, I made it—I'm a slow burner—I made up my mind pretty well that night when he told me what he did about this, about his attitude toward Negroes.

TRIAL EXAMINER: Was it before or after you made up your mind to fire him that you talked about his advancement on the machine?

THE WITNESS: Well, it was after I tried to sell him the idea of being more tolerant bu I didn't get very far.

TRIAL EXAMINER: In what way didn't you get very far?

THE WITNESS: His attitude was obvious that he was prejudiced.

At the conclusion of Mitchell's cross-examination, he testified as follows:

Q. Am I correct you discharged Mr. Cowan because he talked back to you?

A. Yes.

Q. And that was the reason why he was discharged?

A. No.

MR. YOCUM: No.

Q. (By Mr. Limesand) All right—

TRIAL EXAMINER: Just a minute.

MR. YOCUM: You're assuming a fact not in evidence.

TRIAL EXAMINER: Just a minute. Mr. Mitchell, at the time you started this conversation with Bunker, had you already determined to discharge Cowan or not?

THE WITNESS: Yes, I believe that I was ready to let him go because his attitude seemed to me, I couldn't compromise him when I talked to him.

TRIAL EXAMINER: Two nights before the 14th?

THE WITNESS: Two nights before. I wasn't satisfied that his attitude would be right. I was concerned about it. Then when he popped off to me that night, well I knew that his attitude wouldn't be right.

In a pretrial affidavit Mitchell stated that he had decided to fire all five men at the meeting with Johann on October 12. At the hearing Mitchell stated that this was an error, as he had reached no decision with respect to Bunker, and the number should have been four not five.

When Cowan reported for work on the following day, his card was missing. He spoke to Johann, who went to see Ten Barge, the other supervisor, who also did not testify. Ten Barge simply told Cowan "You're released," and told Cowan to get his paycheck.

E. Postdischarge developments

Each of the men involved received with his final paycheck a written statement that he was discharged because "Work was not satisfactory. Insubordination." The following January 4 the Company wrote each of them, asking them to return to work by January 12, 1966, and offering them full reinstatement, but declaring that the Company had not violated the law in discharging them.

On the witness stand Mitchell admitted hostility to the Union. The only allegations of unlawful conduct on the Company's part, however, concerns the discharges described above; the allegation in the complaint of unlawful interrogation was dismissed for want of any supporting evidence.

F. Concluding findings

1. Bruning, Sumrall and Galloway

The issue with respect to each discharge is whether General Counsel sustained his burden of proving that the Company's action was motivated in significant part by the employee's union activity. The Company does not have the burden of proving that it discharged them for the reasons stated by the Company. And it is by now a truism that an employee may lawfully be discharged for no reason at all. On the other hand it is likewise true that employers do not ordinarily dis-

charge men "for no reason at all," and the Company here does not claim to have done so. Moreover, judicial authority warrants inquiry into whether an employer's asserted motive for discharge "withstands scrutiny," and goes so far as to declare that its failure in that regard can furnish support for a finding of unlawful motivation. See, e.g., **N.L.R.B.** v. **Dant**, 207 F. 2d 165, 167 (C.A. 9), and cases there cited. Without overlooking for one moment that the burden of proof rests on General Counsel, I turn first to a consideration of the reasons advanced by the Company for the first discharges—those of Sumrall, Bruning, and Galloway.

According to Mitchell's testimony, these discharges had their genesis in his October 11 conversation with Cowan on the night shift at which Mitchell learned that Cowan was opposed to the hiring of Negroes, and that Cowan said other employees (naming Bunker, perhaps erroneously) were similarly opposed. The next day, according to Mitchell, he told Johann and Ten Barge about the conversation with Cowan, asked who else besides Bunker would be prejudiced against Negroes, and was told that Johann felt sure he knew who they were. Mitchell testified that Johann named Bruning, Sumrall, and Galloway as a "little clique that ran together," whose work was not good, and whom he had warned several times. Mitchell, according to his testimony, said to let them go as "We can't afford to have this kind of trouble." In his pretrial affidavit he stated that he wanted those men out before the Negroes came to work.

The trouble I have with this explanation stems in large part from the failure of Johann to testify. Why

should Mitchell's report on the prejudice of Cowan and Bunker, night-shift employees, lead Johann to the view that those prejudices were shared by three men on the day shift? Nothing in the record establishes any association of consequence between the three day men on the one hand and Cowan and Bunker on the other. And there is not a scintilla of evidence that any of the day men in question was anti-Negro. Moreover, the Company never told them that their allegedly anti-Negro views caused their discharges. On the contrary, they were told orally that they were discharged for unsatisfactory work, and they were told in writing that they were discharged for unsatisfactory work and "insubordination." The record is totally devoid of evidence of their "insubordination," unless the Company felt that engaging in union activity was insubordinate. As to their work, the record contains no evidence that their work was poor or that they had been criticized for bad work; Mitchell testified Johann said he had criticized them, but Johann did not testify and the employees' denials of criticism thus stands uncontradicted by any direct evidence. To be sure, there is some mention of tardiness, but no suggestion that this occurred recently (Galloway had received a pay raise a week before), and it was not mentioned orally or in writing when they were discharged.

Johann's testimony might have shed light on these mysteries. To be sure, General Counsel could have called him as a witness, but it seems more logical to expect the Company to have put him on the stand, particularly following employee testimony that he had not warned them about unsatisfactory work. Compare **N.L.R.B.** v. **Kalof Pulp & Paper Corp.**, 290 F. 2d 447, 451 (C.A. 9); **N.L.R.B.** v. **Elias Bros. Big Boy, Inc.**, 327

F. 2d 421, 427 (C.A. 6); see Note 5 A.L.R. 2d 893, 896, 907-908, 909-911. As the Seventh Circuit stated in **W.H. Miner, Inc.** v. **Peerless Equipment Co.**, 115 F. 2d 650, 655, cert. den. 312 U.S. 687: "Furthermore, the master rightfully suggested that the failure of available officers who had personal knowledge of the facts to testify raised an inference unfavorable to defendants' attempted allocation."

In the absence of Johann's testimony, the record compels disbelief of the Company's story that it fired Bruning, Galloway, and Sumrall because of Johann's alleged report on their race prejudice. The record is clear that their timecards were removed from the rack on October 13. But Cowan's card was not missing until the next day, and according to Mitchell's own testimony he had not decided to fire Bunker until he heard of Bunker's "insubordination." Yet Mitchell had first hand awareness of Cowan's prejudice, and at least as much reason to believe Bunker guilty of that offense as he had to believe it of the three day-shift men. If their cards were pulled and their discharges settled on because of a fear of race prejudice, Cowan's and Bunker's would have been handled the same way at the same time.

I find, in short, that the reasons assigned both at the time of discharge and at the hearing were not the real reason for the discharge of Bruning, Galloway and Sumrall.

These "negative" findings do not of themselves, however, establish General Counsel's case. General Counsel also showed that these men had engaged in union activity on the premises, that they had signed union cards, that they (together with Cowan, Bunker and

two others) attended a union meeting the night before their discharge, that each of them had also given cards to one or two other employees, and that the Company was opposed to the advent of the Union. The question is whether these facts added to the spurious reasons advanced by the Company add up to an affirmative case for the General Counsel. The courts have held that a disproportionate selection of union men for discharge "may under certain circumstances be very persuasive evidence of discrimination." **N.L.R.B.** v. **Bachelder**, 120 F. 2d 574, 578 (C.A. 7), cert, den. 314 U.S. 647; **N.L.R.B.** v. **Shedd Brown Mfg. Co.**, 213 F. 2d 163, 174 (C.A. 7). But the Company argues here that the record contains no evidence whatsoever that it was aware of any union activity at the time it discharged the three day-shift men, and indeed that Mitchell testified positively to the contrary.

Mitchell's testimony, if credited, would compel a finding that the Company was unaware of union activity. This would put the case in the "Discharge for no reason at all" category (if such cases actually do exist), for as shown above I find on this record that the three were not discharged for the reasons given them or for those advanced at the hearing. By the same token, having found against the Company on its asserted grounds, I have in effect stated that I do not credit Mitchell.

With all this, however, we are left with little affirmative evidence in the record that the Company knew or blieved these men to be in the Union. The most that can be said on the affirmative evidence is that Johann (according to Mitchll) referred to them as a clique, and the word "insubordination" appears as a ground for their discharge, although there is not a scintilla

of evidence that they were guilty of any insubordination beyond joining the Union. In addition, the record discloses that each of them engaged in some union activity in the plant at this time, and that the plant consisted of only 18 or 19 men on the day shift, and 3 or 4 on the night shift. This circumstance, when coupled with the employer's admitted hositility to the Union, and with the affirmative evidence that false reasons were given for the discharges, warrants the inference that the true reason, which was concealed, was the union activity. See the recent discussion of the "small plant" doctrine by the First Circuit, enforcing the Board's Order in a case involving a plant of 100 employees. **N.L.R.B.** v. **Joseph Antell, Inc.**, No. 6619, 6657, April 20, 1966, enforcing **Malone Knitting Co.**, 152 NLRB No. 68. I therefore find that the Company discharged. Sumrall, Bruning, and Galloway for union activity. 3/

3/ General Counsel does not contend that if Sumrall, Galloway, and Bruning were jointly opposed to the hiring of Negroes, this would be protected concerted activity on their part. In my view employees acting in concert in support of nondiscrimination in hiring are engaging in protected activity (see **N.L.R.B.** v. **Tanner Motor Livery, Ltd.**, 349 F. 2d 1, 4 (C.A. 9), but employees acting in concert to support racially discriminatory hiring policies would not be protected by the Act as their objective would be contrary to the public policy of the United States as expressed in the Civil Rights Act of 1964. Cf. **Southern Steamship Co.** v. **N.L.R.B.**, 316 U.S. 31, 47.

2. Bunker

The Company contends that Bunker was discharged for being insubordinate to Johann. The Company makes no contention that his work was unsatisfactory (notwithstanding the statement to that effect on the statement accompanying his final paycheck), and makes no contention that his alleged race prejudice (which he denied, but which Cowan, apparently in error, reported to Mitchell) played any role in the discharge. And while the Company admittedly knew of Bunker's union activity when Mitchell fired him, this would not serve to protect Bunker against a discharge for insubordination.

Bunker denied that he was insubordinate. I found him a somewhat untrustworthy witness, evasive and unreliable, and would not rest my decision on his self-serving testimony. But the testimony of the only witnesses to the scene between Bunkr and Johann who testified at the hearing supports Bunker's testimony. Their testimony establishes that when Johann learned Bunker was telephoning the Union an argument ensued between them, that both men became angry, and that Bunker did not menace or threaten Johann.

The exact words of the argument are not reported, beyond Bunker's statement that there will be a union, a reply to Johann's observation that there was no union there. Under circumstances not too dissimilar, an employee was held within the protection of the statute when he referred to his supervisor in most uncomplimentary terms. **N.L.R.B. v. Thor Power Tool Co.**, 351 F. 2d 584 (C.A. 7). A mere showing that Bunker, while engaging in union and concerted activity, got into an argument with a supervisor about unions

falls far short of establishing that he was so insubordinate as to forfeit statutory protection.

Of course, if Bunker had physically threatened Johann the case would be otherwise. But on this record, the proof is that he did not do so. Had the Company wanted to establish the contrary, particularly after Bruning's testimony that Bunker did not assume a threatening attitude, it could have called Johann as a witness.

To be sure, Johann told Mitchell that Bunker had been abusive and threatening. Since Mitchell acted on Johann's report, the case is similar to **N.L.R.B.** v. **Burnup & Sims,** 379 U.S. 21. It matters not, under that case, that Mitchell honestly believed Bunker had threatened Johann, for Mitchell knew that Bunker had been engaged in a protected activity (telephoning the Union to protest the discharges), the basis of the discharge was an alleged act of misconduct in the course of that activity, and the proof establishes that the employee was not in fact guilty of that misconduct.

I find, therefore, that Bunker was engaged in a protected activity in his discussion with Johann, and that the proof affirmatively establishes that he did nothing to forfeit that protection. His discharge for that activity violated Section 8(a)(1) under the **Burnup** case. In addition, I find that Mitchell in firing Bunker called him an "agitator." Cowan, who is still in the Company's employ, corroborated Bunker as to this, and I credit them over Mitchell's less-than-categorical denial. The race issue had not yet been injected into the conversation, and the term "agitator" appears to have referred to Bunker's union activity. I find, therefore, that Mitchell in discharging Bunker was also moti-

vated by a resentment of this activity, and therefore the discharge violated Section 8(a)(3) as well as Section 8(a)(1).

3. Cowan

Cowan's discharge apparently resulted from his participation in the conversation between Mitchell and Bunker. Mitchell testified that Cowan's opposition to the hiring of Negroes was likewise a factor, but although Mitchell was aware of this attitude as early as October 11, Cowan's timecard was still in place on October 13, after Bruning's, Sumrall's, and Galloway's had been removed, and Cowan did not learn of his discharge until the following morning.

Mitchell testified that Cowan said something during Mitchell's conversation with Bunker, that Mitchell asked Cowan, "What did you say," that Cowan replied "I wasn't talking to you," and that this reply showed so bad an attitude (Mitchell referred to it as "popping off") that he instantaneously determined to let Cowan go. On the other hand, Cowan and Bunker describe the episode as arising out of Mitchell's calling Bunker an "agitator," at which time Bunker asked Cowan if he heard the expression, Cowan replied "Yes, I heard it," and Mitchell turned on Cowan with "What have you got to do with this?" Piecing the three versions together, I find that Cowan answered that query by saying, "I wasn't talking to you," and Mitchell reacted as described above.

In the light of all the circumstances, I find that Mitchell's irritation at Cowan stemmed in substantial part from Mitchell's discovery that Bunker and Cowan were allied in the union matter to which Mitchell

referred when he called Bunker an "agitator." It follows, of course, that Cowan's discharge was likewise violative of Section 8(a)(3) and (1) of the Act.

Conclusion of Law

The Company by discharging Bruning, Bunker, Cowan, Galloway, and Sumrall under the circumstances and for the reasons described above engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

The Remedy

I shall recommend an order directing the Company to cease and desist from its unfair labor practices and from any other invasions of its employees rights under Section 7 of the Act. See **N.L.R.B.** v. **Entwistle Mfg. Co.**, 120 F. 2d 532, 536 (C.A. 4). Affirmatively, I shall recommend that the Company reimburse the five employees in question for losses incurred between October 14, 1965, and January 11, 1966, inclusive, under the formulas approved by the Board in **F. W. Woolworth Co.**, 90 NLRB 289, and **Isis Plumbing & Heating Co.**, 138 NLRB 716, and that it post appropriate notices.

Upon the foregoing findings of fact and conclusions of law, and upon the record as a whole I recommend, pursuant to Section 10(c) of the Act, issuance of the following:

ORDER

Hesmer Foods, Inc., its officers, agents, successors, and assigns, shall:

(1) Cease and desist from:

(a) Discharging or otherwise discriminating against any employee because of his membership in or support of Hotel & Restaurant and Bartenders International Union, AFL-CIO, or any other labor organization.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

(2) Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make Robert Bruning, James Bunker, Charles Cowan, Max Galloway, and Robert Sumrall whole in the manner described in the portion of the Trial Examiner's Decision entitled "The Remedy" for any loss of earnings suffered by reason of the discrimination against them.

(b) Preserve, and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms hereof.

(c) Post at its plant on Stockwell Road in Evansville, Indiana, copies of the notice attached hereto and marked Appendix. 4/ Copies of such notice to be fur-

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4/ In the event that this Order is adopted by the Board, the words "AN ORDER" shall be substituted for "A RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a United States Court of Appeals the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING" shall be inserted immediately preceding "AN ORDER."

nished by the Regional Director for the Twenty-fifth Region, shall after being duly signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Twenty-fifth Region, in writing, within 20 days from the date of the receipt of this Decision what steps the Respondent has taken to comply herewith. 5/

Dated at Washington, D.C.

Frederick U. Reel
Trial Examiner

5/ In the event that this Order is adopted by the Board, this provision shall be modified to read, "notify said Regional Director, in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX TXD-269-66

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A RECOMMENDED ORDER OF A TRIAL
EXAMINER OF THE
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(AS AMENDED)

we hereby notify our employees that:

WE WILL pay Robert Bruning, James Bunker, Charles Cowan, Max Galloway, and Robert Sumrall for wages they lost between October 14, 1965, and January 11, 1966.

ALL OUR EMPLOYEES have the right to join or assist HOTEL & RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO, or any other union.

WE WILL NOT discharge or discriminate against employees, ir interfere with them in any way, because of their union activity.

HESMER FOODS, INC.
(Employer)

Dated..... By.....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana 46204 (Tel. No. 633-8921).